TOM MANAS ENTERPRISE SDN. BHD.

v.

SOH AH WAH

HIGH COURT MALAYA, KUALA LUMPUR
TUAN LOW HOP BING J
[CIVIL CASE NO. D5-22-145-94]
21 JANUARY 1995

PRACTICE & PROCEDURE: *Order 27 r. 3 Rules of the High Court 1980 - Judgment pursuant to admission of facts - Rationale - Applicability - Whether only applicable after proceedings had begun - Admission of facts thereof - Whether to be pleaded.*

The plaintiff had embarked on some dealings in share transactions, and towards that end had pledged 100,000 units of Kian Joo Factory Berhad shares (the shares) to the defendant in return for the use of certain facilities, including the use of the defendant's margin account to finance the transactions. The parties agreed that upon the defendant's request for withdrawal of the facilities the plaintiff would redeem the shares and pay all the outstanding charges.

Following the defendant's request to withdraw the facilities the plaintiff accordingly redeemed the shares and paid the necessary charges, but the defendant refused to return the shares claiming that his margin account was too highly geared then to enable him to make the release. The defendant nevertheless executed a trust deed declaring that he was holding the shares upon trust for the plaintiff, and that he would deliver the same upon request by the plaintiff. This apart the defendant also wrote a letter to the plaintiff's remisier admitting that he would make good the shares. Based upon the aforesaid admission of facts the plaintiff invoked O. 27 r. 3 Rules of the High Court 1980 and applied for an order for delivery of the shares to them.

Before the learned Judicial Commissioner the defendant argued *inter alia*:

1. that O. 27 did not apply as the admission relied upon here was not made after an action had been commenced.
2. that the admission was made to a third party under a mistake of fact and law and therefore could not be binding.
3. that in any case, as the admission in question was not pleaded in the statement of claim it was not open to the plaintiff to rely on the same.

Held:

[1] There is no merit in the contention that O. 27 only applies when an action has already commenced. There is abundant authority to support the proposition that the Courts can consider and decide on the admissions made before or after legal proceedings have been commenced.

[2] The failure to plead the admission herein is not fatal. It is trite that pleadings should only contain a statement of the material facts on which the party pleading relies and not the evidence by which those facts are to be proved. Hence it is not essential that an admission, which relates to and is governed by the rules of evidence, be pleaded.

[3] There is no necessity under the Rules for the admission to be made to the plaintiff. An admission does not cease to be an admission merely because it was made to a third party who has no authority to act or rely on it. The admission thus remains binding on the defendant.

[Application allowed]

Cases referred to:
Ellis v. Allen [1914] 1 Ch 904 ***(refd)***
Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn. Bhd. [1970] 2 MLJ 111 ***(refd)***
Overseas Investment Pvt. Ltd. v. Anthony Williams O'Brien & Anor. [1988] 2 CLJ 238 ***(refd)***
Neville v. Matthewman [1984] 3 Ch. 345 ***(refd)***
Porrett v. White [1886] 31 Ch. 345 ***(refd)***
Davy v. Garrett [1878] 7 Ch D 473 ***(refd)***
E-De-Hean Ag v. Liew Keng Pang [1989] 2 MLJ 400 ***(refd)***
Muthukrishnana a/l Suppiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & 2 Ors. & Another Application [1994] 4 CLJ 568 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 27 r. 3

Other source referred to:
Halsbury's Laws of England, para. 15, Vol. 36 (4th Edn.)

For the plaintiff - Raja Eleena, Siew, Ang & Tan
For the defendant - A.J. Hamzah & Co.

JUDGMENT

Low Hop Bing J:

I Application

The plaintiff applies, under O. 27 r. 3 of the Rules of the High Court 1980, for leave to obtain an order against the defendant to deliver up to the plaintiff 100,000 Kian Joo Can Factory Berhad shares or its equivalent monetary value thereof, together with interest and costs.

Order 27 r. 3 reads:

> Where admissions of fact are made by a party to a cause or matter either by his pleadings or **otherwise**; any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

In my judgment, I hold that an admission made by letter, of facts which show that the defendant has no defence to the action, may be sufficient to enable the plaintiff to obtain judgment (*Ellis v. Allen* [1914] 1 Ch 904, *Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn. Bhd.* [1970] 2 MLJ 111).

> The object of the rule was to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. (per Sarjant J, in *Ellis, supra* at p. 908.

II Facts

From the affidavit of Mohd. Jamin bin Amin affirmed on 14 June 1994 ("the 1st affidavit") and the affidavit of Ignatius Luke Jr. Tan Keng Hee affirmed on 2 September 1994 ("the 2nd affidavit") it is clear that the defendant agreed to let the plaintiff use his margin account and several other margin accounts controlled by the defendant ("the facilities") on the understanding that the plaintiff would bear all legal costs and interest pertaining to the use of the facilities.

The parties herein agreed that upon the defendant requesting return of the use of the facilities, the plaintiff would redeem the shares bought by the defendant on his behalf and repay the loan, whereupon the plaintiff would be entitled to the return of the shares pledged by him, specifically the 100,000 Kian Joo Can Factory Berhad ("Kian Joo Shares") shares.

The defendant requested for the return of use of the facilities in August 1991 and the plaintiff accordingly redeemed the shares and paid in full all the charges for withdrawal of the shares, legal fees and interest. However, the defendant did not return the 100,000 Kian Joo Shares to the plaintiff as he claimed his margin accounts were too highly geared to enable release at that point in time.

On 6 January 1993, the defendant executed a trust deed (exhibited as L7 in the 2nd affidavit) wherein he declared, *inter alia*, that he is holding 100,000 Kian Joo Shares upon trust for the plaintiff and would execute and deliver any transfer of the shares upon request by the plaintiff. Further, the defendant wrote a letter to the plaintiff's remisier (exhibited as L8 in the 2nd affidavit) admitting that he would make good the 100,000 shares of Kian Joo and proposed to put a value of RM7.80 on the shares and forwarded a cheque of RM78,000 to the said remisier made out in the remisier's name. The proposal was rejected as the remisier was not authorised to accept any settlement on behalf of the plaintiff. In any event, the plaintiff wanted return of the shares in physical form. Thereafter, the plaintiff did not hear from the defendant again.

The issues raised by the defendant in his affidavit dated 22 July 1994 have been answered and disposed off by the plaintiff in the 2nd affidavit. No reply has been filed in response to that 2nd affidavit and it is settled law that in a case to be decided on a contest of affidavits, material allegations which are not contradicted are deemed to be admitted: *Overseas Investment Pvt. Ltd. v. Anthony Williams O'Brien & Anor*. [1988] 2 CLJ 238.

III Contentions of the Parties and Decision of the Court

(i) It is submitted for the defendant that O. 27 is only applicable when the admission relied upon was made after an action **had been commenced** and not before. The plaintiff argued to the contrary.

In my judgment, there is abundant authority to support the proposition that the Courts can consider and decide on the admissions made **before or after** legal proceedings have been commenced. For example, in *Neville v. Matthewman* [1984] 3 Ch. 345. the Court considered letters written by the defendant to the plaintiff's solicitors before the commencement of the action, to determine if the defendant has made admissions which would justify an order of payment of money into Court.

Also in *Porrett v. White* [1886] 31 Ch. 345, the Court relied on letters written by the defendant to the plaintiff before the commencement of the action which they deemed competent to fall within O. 32 r. 6 of English Rules of the Supreme Court 1883 (equivalent to our present O. 27 r. 3).

(ii) It was further argued for the defendant that the plaintiff cannot raise or rely on the admission made by the defendant as the plaintiff did not plead the existence of such an admission in his statement of claim.

In my judgment, the plaintiff herein prays for the return of the shares or, in lieu of the shares, its value. This material fact has been pleaded in the statement of claim. It is one of the cardinal procedural rules that pleadings should only contain a statement of the material facts on which the party pleading relies and **not the evidence by which those facts are to be proved.** (See para. 15 of Vol. 36 (4th Edn.) *Halsbury's Laws of England*). Hence it is not essential that an admission, which relates to and is governed by the rules of evidence, be pleaded. In *Davy v. Garrett* [1878] 7 Ch D 473, the Court held that "the fact that an admission has been made by a party should not be pleaded if it is no more than evidence, although it may be the most important fact to be proved at the trial". In that case, part of the plaintiff's statement of claim was full of letters which passed between some of the defendants and 3rd parties which were said to be admissible as admissions tending to make out part of the plaintiff's case. The Court struck out the statement of claim with liberty to the plaintiff to file afresh, on the grounds that the references to the letters were statements of unnecessary facts, as they constituted evidence, by way of admissions.

The defendant also submitted that the 2nd affidavit should be struck off on the following grounds:

(i) There is no proof that the plaintiff authorised the deponent to affirm the said affidavit on its behalf;

(ii) The deponent's assertions constitute hearsay evidence;

(iii) The deponent is not the plaintiff and/or an employee of the plaintiff;

(iv) The deponent is a witness and the defendant should be allowed to cross-examine him.

In respect of ground (1) above, in my judgment, it is to be noted that the deponent was the remisier who handled the plaintiff's shares transactions and as such, had the best knowledge of the events that transpired. He is therefore competent to affirm the affidavit.

In respect of item (ii), I hold that O. 14, r. 2 applies. Order 14 r. (2) provides that:

> An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."

That being the case, any statements of information or belief may be considered by the Court as long as the sources and grounds thereof are stated in the affidavit. In addition, the provisions of the Evidence Act 1950 particularly the rule against hearsay do not apply to affidavit evidence, (s. 2 of the Evidence Act 1950, *E-De-Hean Ag v. Liew Keng Pang* [1989] 2 MLJ 400, *Muthukrishnana a/l Suppiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & 2 Ors. & Another Application* [1994] 4 CLJ 568).

Under item (iii), I hold that O. 27 does not say that only the plaintiff and/or its employees may depose affidavits to support the plaintiff's application made thereunder. In my judgment, any person having knowledge of the matter may affirm an affidavit which is a written statement of evidence, sworn by the person making it. It is only proper that the deponent of the statement with knowledge of the facts should depose the same. If the defendant has evidence to oppose what is stated in the deponent's affidavit, he should have filed an affidavit averring to those facts. However, the facts stated in the deponent's affidavit were not denied or challenged as the defendant elected not to file an affidavit in reply. If the defendant has grounds to allege that the deponent is not *bona fide* or has some other reason to treat the affidavit as not *bona fide* or with distrust, he should apply to cross-examine the deponent of the affidavit pursuant to O. 38 r. 2(3) but this was not done here. Order 38 r. 2(3) reads:

> The Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit and, where, after such an order has been made, the person in question does not attend, his affidavit shall not to be used as evidence without the leave of the Court.

Defendant in addition said that he was wrongly sued on the ground that the plaintiff had instructed TA Securities Sdn. Bhd. to pledge all the 137,000 Kian Joo shares solely into the defendant's account.

In my judgment, I find that the arrangement agreed to between the plaintiff and the defendant was that the plaintiff would be allowed to utilize the defendant's margin account and several other margin accounts controlled by him (of which Kaziz Sdn. Bhd. is one of them). This is averred to in para. 5 of TKH's affidavit (which has not been denied by the defendant) and is evident from the proposed Memorandum of Understanding exhibited as "L1" in the second affidavit. The arrangement was between the plaintiff and the defendant alone. That being the case, the defendant is the correct party to be sued for the return of those shares which have been purportedly sold by the defendant. There was no application by the defendant to strike out the plaintiff's action under O. 18, r. 19, if indeed it was correct that the defendant was wrongly sued.

The defendant also raised the issue that the trust deed dated 6 January 1993 is invalid as he was unaware that the 100,000 Kian Joo shares were pledged in Kaziz Sdn. Bhd.'s account. I find that this contention contravenes para. 7 of his affidavit in which he stated that 37,000 of the Kian Joo shares were pledged to his personal account and the other 100,000 were pledged to Kaziz Sdn. Bhd.'s account. At all material times the defendant was in receipt of statement of accounts and client liquidity statements from AMMB (as exhibited in his affidavit dated 22 July 1994) and should have known of the existence of the Kian Joo shares in the accounts controlled by him.

In any event, s. 23 of the Contracts Act 1950 provides that "a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to matter of fact." In addition, a mistake as to any law in force in Malaysia does not render a contract voidable: s. 22 of the Contracts Act 1950. The defendant further contends that as the plaintiff did not rebut his allegations of duress and force raised in his defence, the plaintiff is deemed to have admitted these allegations. The answer to this contention is to be found in O. 18 r. 14 (1) which provides that:

> if there is no reply to a defence, there is an implied joinder of issue on that defence.

Paragraph (4), *ibid*, states that:

> A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which is an implied or express joinder of issue ...

Finally, the defendant argued that the admission dated 21 December 1993 was made to a 3rd party under a mistake of fact and law. In my judgment, I find no merits in this submission. There is no necessity under the rules for the admission to be made to the plaintiff. In *Ellis v. Allen supra*, the admission was made by the defendant's solicitors to the plaintiff's solicitors and this was deemed to fall within the provisions of the rules. An admission does not cease to be an admission merely because it was made to a 3rd party who has no authority to act or rely on it. However, it remains binding on the party who made it.

On the foregoing grounds, I allow the plaintiff's application under O. 27 r. 3 and made an order in terms thereof.